INQUESTS ARISING FROM THE DEATHS IN THE LONDON BRIDGE /

BOROUGH MARKET TERROR ATTACK OF 3 JUNE 2017

SUBMISSIONS ON BEHALF OF THE HOME SECRETARY ON DETERMINATIONS CONCERNING PROTECTIVE SECURITY

INTRODUCTION

1. These submissions are served on behalf of the Secretary of State for the Home Department ("SSHD") to address, on behalf of the Home Office, the issue of protective security. They have been drafted in light of the submissions, dated 24 June 2019, of Counsel to the Inquests ("CTI") and on behalf of the families of the deceased. The submissions are served together with those addressing MI5's investigation and should be read together in relation to all submissions concerning MI5, the Home Office and the Department for Transport.

2. The SSHD notes, and endorses, the submissions made by CTI concerning (i) the legal principles applicable to the formulation of the Coroner's determinations in these Inquests and (ii) CTI's proposals for dealing with the issue of PFD reports.

3. These submissions address the question of Article 2 engagement insofar as it arises from the evidence relating to the involvement of the Home Office in these inquests. The SSHD makes observations below as to the way in which the Coroner should approach the 'general duty'.

4. In summary the SSHD's position is that:

    (i) There is no basis upon which it can properly be argued that the Home Office knew or ought to have known on 3 June 2017 of the existence of a real and immediate risk to the lives of the victims of the attack from the criminal acts

of a third party/parties or that they failed to take measures within the scope of their powers, which, judged reasonably, might have been expected to avoid that risk. There is no arguable breach of the 'operational duty'.

(ii) There is no arguable breach on the part of the SSHD to have in place a framework of laws, precautions, procedures and means of enforcement to protect life in the context of protective security. The Home Office, through the Office for Security and Counter Terrorism ("OSCT") established the UK's counter terrorism strategy, CONTEST, which comprises a four-strand framework to reduce threats and reduce vulnerabilities: Prevent, Pursue, Protect, Prepare. CONTEST is a living strategy, which is subject to constant review and has been judged to be fit for purpose.

ARTICLE 2

Application of the principled approach in the present case

General or Systemic Duty: the law

5. The SSHD makes the following observations on CTI's characterisation of the 'general duty'.

6. It is accepted that the 'general duty' may arise in a range of contexts, including environmental protection and public health. However (i) the nature and scope of the duty must be carefully identified having regard to the specific context of that duty, and (ii) the way in which it is said to have been breached must be identified with precision and by reference to evidence.

7. So far as the 'general duty' is concerned with death arising from the criminal acts of third parties, it requires states to have in place criminal law provisions backed up by law enforcement machinery. Otherwise, the operational duty requirements must be satisfied. See *Mastromatteo v Italy* (Application No. 37703/97):

> 67. The State's obligation extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences

> against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. Article 2 may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.
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> 68. That does not mean, however, that a positive obligation to prevent every possibility of violence can be derived from this provision … Such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources (Osman, cited above, p. 3159, § 116).

The distinction between the general duty to put in place criminal law provisions to deter the commission of offences and the positive obligation to take preventive operational measures in certain well-defined circumstances must be drawn.

8. CTI refer to *Kakoulli v Turkey* (2007) 45 EHRR 12 and *Makaratzis v Greece* (2005) 41 EHRR 49 in support of the proposition that the 'general duty may extend beyond written procedures, to encompass the planning and control of operations (including police operations)'. In both of those cases the Court concluded that Article 2 implied a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework defining the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the relevant international standards. Both of these cases involved the deliberate taking of life by agents of the state and the instruction to them of when they were permitted to use lethal force. In *Kakoulli* the Court reached conclusions in relation only to the operational duty that the use of force was neither proportionate nor absolutely necessary for the purpose of "defending any person from unlawful violence" or "effecting a lawful arrest".

9. CTI cites *Onyerdilniz v Turkey* (2005) 41 EHRR 20 with regard to the State's duties to protect persons from environmental or industrial disasters. However, the following should be noted:

   - In the context of industrial activities, which the Court has deemed to be by their very nature dangerous, the ECtHR has placed a special emphasis on regulations geared to the special features of the activity in question, particularly with regard to

the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks. This relates to specific operations and is akin to Health and Safety and licensing legislation.

- The Court has consistently held that where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means. In this respect an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources; this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres (*Budayeva and Others v. Russia*, (Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02) §§ 134-135; *Vilnes and Others v. Norway*, (Applications nos. 52806/09 and 22703/10) § 220; *Brincat and Others v. Malta*, (Applications nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11) § 101).
- The scope of the positive obligations in the particular circumstances will depend on the origin of the threat and the extent to which one or the other risk **is susceptible to mitigation** (*Budayeva*, §§ 136- 137; *Kolyadenko and Others v. Russia*, Applications nos. 17423/05, 20534/05, 20678/05, 23263/05 and 35673/05 § 161).

10. In *R (AP) & (MP) v HM Coroner for Worcestershire & ors* [2011] EWHC 1453 (Admin), at §73, Hickinbottom J emphasised the purpose of the general duty:

> 73. … but, as the authorities make clear, one purpose of the general duty under article 2 is to ensure that every state provides a functioning Police Force and effective judicial system that will provide a minimum standard of criminal law protection for the life of those in the jurisdiction of the state. It is not the purpose of the general duty to address the specific needs of particular groups, unless the systems operate effectively to bar equal access to the criminal justice system for that group.

The point is that the ECtHR has identified within Article 2 a duty to protect life by putting in place a framework of laws at a relatively high level of generality. It is hard to see how the specific definition through which places in the UK should be prioritised in terms of a likely terrorist attack falls within that 'general duty'. It should not be forgotten that police and local authority resources are also required to be deployed in order to protect against a wide variety of other criminal offences.

11. Insofar as it is submitted that there was arguably a breach of the general duty to put in place procedures to protect the general public from terrorist attack, it is incumbent upon the Coroner, based on evidence adduced during the course of the inquests, to identify what procedures should reasonably have been put in place and what failure in regulation is said to have occurred. See: *Chief Constable of Devon and Cornwall Police v HM Coroner for Plymouth, Torbay and South Devon* [2013] EWHC 3729, Stuart Smith J at paragraphs 7, 16 (iii) and 20.

> 7. The central concern, for reasons that will appear, is whether there was evidence that the lack of a procedure directed to suicide risk motorists involved a systemic failure on the part of the Claimant. On that point, although the evidence established the absence of any specific procedure, there was no evidence adduced about what would have been an appropriate procedure for suicide risk motorists. Specifically, there was no evidence that the Claimant's current procedures for dealing with vulnerable persons generally were deficient or not reasonably applicable in the case of suicide risk motorists. Doubtless because of the absence of such evidence, Counsel were constrained in the case that they could put in cross-examination, so that the witnesses were not asked to address any direct suggestion that the current procedures were deficient or any suggestion based upon evidence about how they could or should be improved.
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> 16…
> (iii) Procedure in Coroner's courts should be evidence based and there can be no justification for asking a Jury to make a finding for which there is no evidence. The harm that could ensue if juries are asked to speculate without any evidence to support their speculation is obvious. This is not in any way a criticism of the diligence with which a jury approaches its task: it is simply that, if there is no material upon the basis of which a jury can answer a question, asking them to do so presents them with an impossible task;
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> 20. I am clear in my view that, if something as complex as procedures for dealing with particular groups of vulnerable people are to be criticised, the criticism must in all fairness be based upon evidence and cannot be left to the well-intentioned but necessarily speculative and uninformed views of a jury in the absence of relevant evidence.

12. See also *Fernandes v Portugal* at § 188:

> For the Court's examination of a particular case, the question whether there has been a failure by the State in its regulatory duties calls for a concrete assessment of the alleged deficiencies rather than an abstract one.

13. Put simply, the general duty relates to a high level provision of law enforcement mechanisms. Bearing in mind that (i) terrorism was one of a very large number of potential criminal threats facing the UK population; (ii) vehicle as weapon attacks were not the only form of threat: the UK and abroad were facing a wide and evolving range of terrorist methodologies; and (iii) it was not known on a general level whether an attack would take place anywhere in the UK, or if so, how, when or where:

    a. What is the high level failure of regulatory duties that is said to constitute the alleged arguable breach of the general duty?

    b. Is it simply that the judgment call as to the way in which crowded places should have been prioritised is said to be wrong?

    c. How is it asserted that resources should have been prioritised in any different way from the way in which they were prioritised in May / June 2017? What would that definition have looked like?

    d. Is it asserted that London Bridge and other bridges in London and around the country should have been prioritised above all other busy streets which did not contain street furniture?

    e. If not, is it suggested that putting temporary or permanent HVM on all busy streets would have been the only way in which to satisfy the general duty? Should the Nice and Berlin attacks have triggered a mandatory consideration of the susceptibility to attack of every busy street in the UK? Should this have diverted resources from other policing needs?

    f. What different advice should NaCTSO have promulgated to owners and occupiers not just of crowded places, but also to every local authority and / or highway authority where there could be people on a road accessible to vehicles?

g. Where is the legal authority which provides that the Article 2 'general duty' requires the State to put in place specific physical measures to protect against the criminal acts of third parties. None has been identified by CTI or Counsel for the families.

14. It is submitted that in identifying the scope of the general duty, the Coroner should not impose an impossible burden on the Home Office, without due consideration being given to the choices that must be made in terms of priorities and resources. As the ECtHR said in *Mastromatteo*, the general duty does not give rise to a positive obligation to prevent every possibility of violence.

The Facts

Protective security

15. There is no evidence that the SSHD even arguably failed to discharge the general 'systemic' duty to '*establish a legislative and administrative framework designed to provide effective deterrence against threats to the right to life*.' Whilst it is appreciated that 'arguability' is being considered, it is submitted that this is fanciful in this case.

16. There is a robust framework of criminal law prohibiting the commission of terrorist acts and an extensive, and highly sophisticated, machinery of intelligence and law enforcement capability dedicated to enforcing that legal framework. There has never been any suggestion, in the domestic authorities or by the Strasbourg court, that the United Kingdom's system of criminal law and law enforcement fails to meet the general systemic obligation imposed by Article 2.

17. Notwithstanding the argument that the general duty does not impose an obligation to prevent every type of violence / criminal act, there is no arguable breach on the part of the SSHD to have in place a framework of laws, precautions, procedures and means of enforcement to protect life in the context of protective security. Evidence was heard that:

a. The Home Office, through the Office for Security and Counter Terrorism ("OSCT") established the UK's counter terrorism strategy, CONTEST, which comprises a four-strand framework to reduce threats and reduce vulnerabilities: Prevent, Pursue, Protect, and Prepare.

b. The Protect strand is overseen by the Director for PROTECT, PREPARE, Chemical Biological Radiological Nuclear Explosives (CBRNE) and CT Science within OSCT, which is supported by the Protect Sub Board. The Board tracks activity across the PROTECT strand of CONTEST, including crowded places, through the Crowded Places Working Group ("CPWG").

c. Between July 2012 and 2018, the CPWG oversaw the development of strategy for crowded places. Sarah Nacey who has given evidence on behalf of the Home Office, chaired the CPWG from April 2016.

d. OSCT, through the Protect Sub Board and the CPWG, had a strategic role in the development of protective security and crowded places: its function was to set the overarching policy and strategy. It had no operational responsibility: the tiering of specific locations, and the delivery of advice regarding crowded places was and is the function of NaCTSO, through its network of Counter Terrorism Security Advisors ("CTSAs"). Save for the assertion that the definition of crowded places was too rigid, as London Bridge did not fall within it, there has been nothing in the evidence to suggest that the strategy was inappropriate or in any way inadequate. It should be noted that the inquests have not heard evidence from NaCTSO, the organisation tasked with the delivery of advice.

e. NaCTSO and CTSAs provide advice and guidance which are free and available to any owner or operator of crowded locations, whether public or private. They also provide bespoke advice to places considered to be of heightened vulnerability, through the prioritisation process. The system is deliberately dynamic so that the police are able to respond to emerging threats and the needs of those with whom they engage. Advice and guidance are provided in relation a broad spectrum of attack methodologies.

f. The very fact that London Bridge was identified by the City of London Police CTSA as a vulnerable site, demonstrates the flexibility and efficacy of the overarching system, which relies on local CTSAs to identify vulnerable sites for protective security advice and guidance. No properly arguable systemic failure has been identified in these inquests.

18. Insofar as CTI or the families seek to rely upon what is said to be a 'rigid' definition of crowded places as founding an argument that the Home Office was in breach of its general duty to protect the public, such reliance is misconceived. First, as set out above, this would not fall within the general duty. Second, the workstream led by NaCTSO, which was fed into by experienced organisations including the Joint Terrorism Analysis Centre ("JTAC") and the Centre for the Protection of National Infrastructure ("CPNI") developed a methodology for prioritising the provision of advice to the owners and operators of crowded spaces. This was a sensible way of identifying how best to prioritise resources. The definition was expanded after 2011, as terrorist methodologies had widened:

> July 2011
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> shopping centres, sports stadia, bars, pubs and clubs which are easily accessible to the public and attractive to terrorists. They are owned and managed by private businesses or local authorities, who are responsible for considering what steps should be taken to protect them, based on advice available from the Government and the police.
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> [Sarah Nacey's witness statement, paragraph 27, DAC D'Orsi's witness statement, paragraph 46]
>
> January 2012, 2014
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> A crowded place is a location or environment to which members of the public have access that may be considered more at risk from a terrorist attack by virtue of its crowd density [or nature of the site]

[DAC D'Orsi's witness statement, paragraph 47]

19. The focus of the definition had widened, between 2011 and 2012, from specific buildings (shopping centres, sports stadia, bars, pubs and clubs), to spaces as well as places (a location or environment). It also introduced scope for prioritisation of crowded places by NaCTSO and CTSAs by reference to broad criteria – 'crowd density or nature of the site'.

20. Evidence was given by Sarah Nacey, Deputy Director of the Office for Security and Counter Terrorism, that *"in 2018 the National Security Capability Review report found CONTEST to be a well organised and comprehensive response to terrorism, with strengths in terms of powers, resources, reach and resilience."*[1]

21. The *system* for the delivery of protective security advice and guidance encompassed not only a guiding definition to enable bespoke police delivery to prioritised places, but the model allowed for the provision of self-service, free and accessible advice to *all* places, whether or not they fell within the definition. The system was also flexible in that it allowed local CTSAs to identify and provide bespoke delivery to vulnerable locations which did not fall within the crowded places definition, as risk determined and resources allowed. This is precisely what happened as regards the identification of London Bridge by City of London Police CTSA PC Hone. Whatever is being suggested by counsel for the families, it was made absolutely clear by COLP and COLC witnesses (responsible for CTSA protective security advice and ownership of the bridge respectively), that neither temporary nor permanent barriers would have been installed on London Bridge by 3 June 2017.

22. **First**, this forms one small part of the comprehensive PROTECT strategy. **Second**, owners and operators have primary responsibility for protective security on their premises. **Third**, in the current case, both the City of London Police ("COLP") and the

[1] Day 31, p220, lines 10-14.

City of London Corporation ("COLC") were aware of their obligations and were taking steps to mitigate risk.

23. Following the range of attacks in 2017, the crowded places definition was again appropriately reviewed and expanded to encompass evidence of a range of attack targets, but also shortened to enable practical efficacy:

> February 2018
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> A crowded place is a location or environment to which members of the public have access that may be considered more at risk from a terrorist attack by virtue of its crowd density or the nature of the site. Crowded places may include: sports stadia, arenas, festivals and music venues; hotels and restaurants; pubs, clubs, bars and casinos; high streets, shopping centres and markets; visitor attractions; cinemas and theatres; schools and universities; hospitals and places of worship; commercial centres; and transport hubs. Crowded places may also include events and public realm spaces such as parks and squares. In each case a crowded place will not necessarily be crowded at all times — crowd densities may vary and may be temporary, as in the case of sporting events or open-air festivals.
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> [Sarah Nacey's witness statement, paragraph 28]
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> Home Office shortened the definition:
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> Crowded places encompass a number of different public locations:
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> a. Permanent buildings which are open to the public;
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> b. Temporary events (such as festivals or sporting events); and
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> c. Crowded spaces (locations such as city centre squares, the public realm, bridges or busy streets) where there is mixed and diverse ownership.

[Sarah Nacey's witness statement, paragraph 29]

24. The fact that something is not carried out, or executed in a particular way, does not, *per se*, make it a breach of the general duty. Insofar as it is suggested that Sarah Nacey's acceptance that the definition may need refining automatically discloses a breach of the general duty, this is an erroneously simplistic way of approaching the general duty. The fact that there are experienced organisations constantly evaluating the efficacy of the model for prioritising resources demonstrates clearly that the general duty is, in fact, being discharged.

25. Insofar as CTI seek to identify deficiencies in the system, in paragraph 44 of their submissions, these are misconceived. More specifically:

    a. It is suggested that if a less rigid approach had been adopted, London Bridge would have been accorded a higher priority in 2016, having regard to the attacks in Nice and Berlin. This fails to recognise: (i) that Nice and Berlin were considered, by expert law enforcement practitioners, to be indicative of the methodology changing to attacks on large events, rather than on streets; (ii) that PC Hone had local knowledge and did indeed identify London Bridge as potentially at risk; (iii) that temporary HVM would not have been installed because of the threat picture and (iv) that permanent HVM was proposed for consideration to COLC in any event.

    b. It is suggested that there was a lack of clear lines of responsibility. This is just wrong. The evidence was given that the lines of responsibility were clearly defined in the CONTEST strategy. Responsibility cascaded from the Home Office (OSCT) to NaCTSO to CTSAs, who were responsible for the provision of advice to owners, operators and local authorities.

    c. It is suggested that there is a lack of clear procedures for the prompt consideration of temporary and permanent HVM on all streets. This is being raised with the benefit of hindsight. At the time of the attack on London Bridge there had been one such attack, which had been considered by law enforcement

agencies to be a precursor to the attempted attack on Parliament. It is easy to say with the benefit of hindsight that there was a high level failure to consider the installation of temporary or permanent barriers on all busy streets. This fails entirely to take into consideration that resources and expertise are finite, that the threat picture is complex and changing.

d. CTI state that there is a realistic possibility that 'superior systems' would have led to HVM on the bridge before the attack if there had been a proper risk assessment in late 2016/early 2017. This is not borne out by the evidence. Late 2016 / early 2017 is highlighted because of the Nice and Berlin attacks. They were seen as attacks on events and were but 2 of numerous worldwide terror attacks with wide ranging methodologies carried out in the previous 2 years. Should resources have been moved from events to streets in the light of this? There is no proper evidential basis for concluding that 'superior systems' would have led to HVM on the bridge. What is the superior system that is suggested and how would it have made a difference? The bridge was <u>in fact</u> considered. No superior system could have done more than that. Given the threat picture there was no basis for deploying the National Barrier Asset and permanent HVM had been suggested for consideration.

26. The purpose of the general duty implied into Article 2 by the courts is not, with the benefit of hindsight, to make suggestions as to specific practices and procedures which could have been done better. It is to ensure that at a high level of generality there are adequate criminal law provisions backed up by law enforcement mechanisms to ensure the protection of individuals from the criminal acts of third parties.

<u>Vehicle Hire</u>

27. It is not clear whether the families make the submission that the fact that there was not a system in place for alerting the police / MI5 in real time to the hiring of a vehicle by an SOI falls within the operational or general duty. Either way, it does not even begin to reach the arguability threshold.

28. ‘General duty’ – the Coroner is referred to the submissions above with regard to the scope of the general duty. The private rental of vehicles does not fall within the ambit of ‘effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions’.

29. Notwithstanding this submission, the facts are as follows:

    a. Witness L and Sarah Nacey made clear that:

        i. there are 15 million vehicle hires in the UK per annum;

        ii. SOIs hire vehicles for all manner of non-nefarious purposes;

        iii. vehicles may be obtained by owning, hiring, stealing, hijacking, borrowing, through employment;

        iv. whilst it may be technically possible, Witness L did not consider it proportionate for MI5 to be made aware every time an SOI hired a vehicle;

        v. he agreed that it was worth examining what more could be done;

        vi. the RVSS is in place and is being kept under review to consider whether any aspects of it should be made mandatory.

30. Witness L said that he would welcome an appropriate procedure “if a workable [procedure] could be found, but I don’t think the practical difficulties here should be underestimated”[2].

31. These issues go to allocation of resources, proportionality and the difficult balance of intrusion into private lives as against the usefulness and necessity to law enforcement.

[2] Day 5, p125

The Article 2 general duty does not even begin to touch upon issues of this nature – see *Mastromatteo* at §68.

Operational Duty

32. The Coroner will receive detailed submissions from the SSHD on behalf of MI5 which the Home Office adopts without repeating here. On a proper application of the legal framework set out in those submissions and for the reasons set out therein it is quite clear that there can be no question of any breach of the *Osman* operational duty in respect of MI5. The same applies, *a fortiori*, to the Home Office and DfT.

33. The Home Office receives threat assessments from JTAC and intelligence from MI5 to inform its policy and strategy-making function. The Home Office's function in relation to protective security is entirely strategic: operational delivery of the CONTEST Protect and Prepare strategy, both on a day to day basis and *in extremis* is for the NaCTSO and CT Policing, which are operationally independent of the Government and accountable to the National Police Chiefs Council.

Conclusion

34. The 'operational duty' does not arise in relation to the Home Office. On a proper analysis of the authorities concerning the 'general duty', there is no arguable breach: there is no 'general duty' to regulate physical protective security of public spaces. Even if there were (which is not accepted), the Home Office had in place a broad counter terrorism strategy which was described as recently as 2018 as being a *'comprehensive response to terrorism'*. The evidence has not provided a 'superior' strategy. The threshold of an arguable breach of the Article 2 general duty has not been met.

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25th June 2019